BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CATHERINE J. DEIST	)	
Claimant	)	
VS.	)	
	)	Docket No. 213,485
DILLON COMPANIES, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

This matter comes before the Appeals Board on remand from the Kansas Court of Appeals. In its decision, the Court of Appeals questioned the Board's method of computing permanent partial disability awards under the post-July 1, 1993, version of K.S.A. 44-510e. The disability awarded by the Board was affirmed by the Court of Appeals and is not currently before the Board on appeal. The only issue before the Board is the proper mathematical method of calculating awards under the post-July 1, 1993, version of K.S.A. 44-510e.

APPEARANCES

Claimant appeared by her attorney, Jan L. Fisher of Topeka, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Scott J. Mann of Hutchinson, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations of the original Award of Administrative Law Judge Bruce E. Moore dated May 13, 1997, are adopted by the Appeals Board for the purpose of this decision.

ISSUES

What is the proper mathematical method of calculating awards for permanent partial general disability under the post-July 1, 1993, version of K.S.A. 44-510e when there is a change in disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Effective July 1, 1993, the Kansas legislature altered the Workers Compensation Act with regard to the method of calculating permanent partial disability awards under K.S.A. 44-510e. The pre-July 1, 1993, version, hereinafter referred to as the "old version", required computations as follows:

> The amount of weekly compensation for permanent partial general disability shall be determined: (1) By multiplying the average gross weekly wage of the worker prior to such injury by the percentage of permanent partial general disability as determined under this subsection; and (2) by then multiplying the results so obtained by 66 2/3%. The amount of weekly compensation for permanent partial general disability so determined shall in no case exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that the disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subjected to review and modification as provided in K.S.A. 44-528 and amendments thereto.

Under the old version of K.S.A. 44-510e, a worker entitled to permanent partial general disability was guaranteed 415 weeks of compensation. This compensation could be in the form of temporary total disability compensation, temporary partial disability compensation or permanent partial disability compensation or any combination thereof. Only in the case of permanent total disability did the 415-week limit not apply.

The modifications made by the Kansas legislature effective July 1, 1993, altered the method of computing permanent partial disability awards. This "new version" of disability computation is as follows:

> (1) Find the payment rate which shall be the lesser of (A) the amount determined by multiplying the average gross weekly wage of the worker prior to such injury by 66 2/3% or (B) the maximum provided in K.S.A. 44-510c and amendments thereto;
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> (2) find the number of disability weeks payable by subtracting from 415 weeks the total number of weeks of temporary total disability compensation was paid, excluding the first 15 weeks of temporary total disability compensation that was paid, and multiplying the remainder by the percentage of permanent partial general disability as determined under this subsection (a); and

> (3) multiply the number of disability weeks determined in paragraph (2) of this subsection (a) by the payment rate determined in paragraph (1) of this subsection (a).
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> The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

The once-guaranteed 415 weeks of benefits is no more. The method of computation, rather than altering the amount of money paid per week, now alters the number of weeks being paid with two-thirds of the average weekly wage or the maximum under K.S.A. 44-510c being the amount due and owing each week. This new computation method is very simple if the permanent partial disability rating remains unmodified. However, workers' compensation ratings frequently change. The new method approved by the legislature for computing work disability awards under K.S.A. 44-510e post-July 1, 1993, makes no provision for changing work disability percentages.

In an attempt to eliminate this confusion and effectuate the legislative intent, the Appeals Board devised a method for computing awards under K.S.A. 44-510e which was designed to bring consistency to work disability awards and to comply with the statutory mandate. The Board's policy, which the Court of Appeals in this case was apparently led to believe was a new policy, was discussed in Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, 947 P.2d 440 (1997), and has been the Board's policy since these new award computations originated. However, as misunderstandings remain, clarifications need to be made.

The Court of Appeals focused on the language of the Board in Bohanan that indicated the award will be computed based on the new or latest disability rating. This comment from Bohanan is only partially accurate. The Board's actual language in Bohanan reads "[t]he last disability rating or amounts already paid, if higher, become the ceiling on benefits awarded." This language does not automatically guarantee that the new or latest disability rating becomes the basis for claimant's final award. At oral argument in this matter, it became clear that certain misunderstandings were generated by this language. Claimant's attorney was under the mistaken belief that, in order for claimant to be entitled to amounts awarded, the amounts must have been "already paid." This is inaccurate. For example, if a claimant were awarded a 50 percent disability under the new law with no temporary disability compensation paid, the 50 percent would be multiplied times the 415 weeks entitlement under the act, and claimant would be entitled

to 207.5 weeks of disability at the appropriate rate. If at the end of 100 weeks time claimant suddenly became reemployed at a comparable wage and her award was reduced under K.S.A. 44-510e to a 10 percent functional impairment, claimant would still be entitled to be paid the 100 weeks of work disability benefits. The new functional disability would not take effect until the end of the 100th week. It would not revoke claimant's right to the weeks payable up to that time, regardless of whether the monies have been paid. Entitlement to the original work disability award during that 100-week period would not be altered.

In this hypothetical case, claimant's new disability of 10 percent would entitle claimant to only 41.5 weeks of disability. That entire disability period would have been paid or become due during the 100-week work disability period. Therefore, claimant would be entitled to no additional monies over and above the 100 weeks already due and owing. Whether claimant had already received the money during that 100-week period is irrelevant. The work disability would be owed up to the date claimant's work disability changed. Therefore, the language of Bohanan would more clearly read the latest disability amount or amounts "already paid or payable," if higher, become the ceiling on benefits awarded. As numerous prior Board decisions show, there is no basis for claimant's concerns that a lower disability amount would cause claimant to lose entitlement to weeks already accrued at the time the disability changed.

The Board's method of computation was affirmed by the Kansas Court of Appeals in the recent decision of Wheeler v. Boeing Co., 25 Kan. App. 2d 632, 967 P.2d 800 (1998), *rev. denied* ___ Kan. ___ (1999). In Wheeler, claimant argued that at the end of the work disability period, when claimant's disability was reduced to a functional impairment, claimant would then be entitled to additional weeks representing the functional impairment weeks after the work disability had been partially paid. However, the Court of Appeals found the Board's computation method to be a proper interpretation of K.S.A. 1997 Supp. 44-510e, stating "[c]redit must be given for the previous number of weeks paid at the higher disability rate or the claimant would potentially receive permanent partial disability benefits that exceed the benefits required to be paid by statute."

Another misconception of both claimant's and respondent's counsel at oral argument to the Board dealt with claimant's entitlement to 415 weeks of benefits. A recent article in the Journal of the Kansas Trial Lawyers Association titled "Calculating Permanent Partial Disability Benefits Under *Wheeler v. The Boeing Company*"[1] created a misconception as to how the 415 weeks in K.S.A. 1996 Supp. 44-510e(a)(3) is applied. The statute states that the compensation shall be paid for not to exceed 415 weeks "following the date of such injury." In the law journal article, an example was provided that

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[1] Jan L. Fisher, "Calculating Permanent Partial Disability Benefits Under *Wheeler v. The Boeing Company*," *Journal of the Kansas Trial Lawyers Association*, Vol. 6, July 1999, p. 13.

an individual with a 1 percent permanent partial disability for 414 weeks and a 100 percent permanent partial disability for the last week would receive the same amount of compensation as an individual having a 100 percent disability for the entire 415 weeks. That is wrong. An individual with a 1 percent permanent partial disability for 414 weeks, followed by a 100 percent disability for the last week, would receive one additional week of compensation. The claimant's entitlement to permanent partial disability benefits would end 415 weeks "following the date of such injury."

In that same law journal article, an alternate method of computing benefits under K.S.A. 1996 Supp. 44-510e was proposed. This computation method was originally proposed to the Appeals Board several years ago, but was fraught with problems. Ullum v. Sedan Limestone Co., Inc., WCAB Docket No. 195,076 (August 1997). This method, also proposed here by claimant, would follow the same basic method as that proposed by the Board but with one major difference. Under the Journal's proposed method, a claimant awarded a percentage of disability who then has a change in disability would not receive payment for the entire time the original disability was in effect. For example, if a claimant was awarded a 50 percent disability with no temporary total paid, this would entitle claimant to 207.5 weeks of permanent partial disability. If this claimant were disabled for 100 weeks, and then claimant's permanent disability changed, the Journal article's method would then multiply the 50 percent disability times the 100 weeks that accrued prior to the change, entitling claimant to only 50 percent of the weeks or, in this case, 50 weeks actually due. Any time claimant's disability changed, that disability would be multiplied times the weeks contained in the period and claimant would be awarded only that percentage of those weeks.

Under the proposed method, during the 100-week period in the above example, claimant would be entitled to payments during only 50 percent of the weeks. Thus claimant would go for 50 weeks with no workers' compensation benefits. The alternative would be to pay claimant for every week at a reduced rate. But this is prohibited by K.S.A. 1996 Supp. 44-510e which requires payment be made at 66 2/3 percent of the average gross weekly wage or the maximum provided in K.S.A. 44-510c, whichever is lower. Therefore, only the number of weeks being paid could be altered under the Journal article's proposed plan.

Another problem associated with this proposed computation method is that it works only retroactively. Only thus can one compute exactly what is due and owing any time a work disability changes. This method cannot be applied prospectively. If the 100-week period passes before the claimant's work disability percentage changes and claimant has already been paid those funds, then it makes no sense for claimant to be suddenly unentitled to 50 percent of those weeks. But that would be the result any time a running award encountered a change in permanent partial disability. There would be created a period of time when claimant was provided benefits and yet suddenly became unentitled to those past paid benefits. The statute does not explain how these unentitled benefits

would be handled. Does claimant receive a bonus of weeks which he or she would not be entitled and yet was already paid? Is the respondent entitled to a credit for those weeks? Neither K.S.A. 1997 Supp. 44-534a nor K.S.A. 44-556 deals with this circumstance where the claimant's work disability changes and claimant's once-entitled benefits suddenly become unentitled.

One potentially disastrous result of this inconsistency and uncertainty would be that respondent attorneys would advise their clients to pay nothing until the full 415-week time period had run. Therefore, modifications of payments would not result in overpayments and the apparent lack of ability to obtain credit for these unentitled weeks would never occur, as the computation of the award could be made retroactively for the full 415 weeks. This could not have been intended by the legislature. "When interpreting what any statute means, this court should give effect to the intent of the legislature to the extent that intent can be ascertained." Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). This new computation statute was intended not to delay payment of awards, but instead to accelerate the payment of monies to claimants. The Journal article's proposed method of computation seems counterproductive to that legislative intent.

The Board's policy is to use the latest disability rating or the amounts already paid or payable from previous disability ratings, if higher, as the ceiling on benefits awarded. Therefore, a claimant who is awarded a large disability and paid for a substantial period of time, who later becomes eligible for a lower disability as a result of a return to some type of employment, would not lose the weeks of benefits already paid or payable under the prior disability award.

The Court of Appeals further criticized the Board's policy method of computing awards by stating "that it appears to be designed to lower awards, at least in a case of this nature." The Board's method of computing awards was not and is not intended to generate smaller or larger awards. The purpose is to comply with the statutory mandate of multiplying the disability rate times 415 weeks and, at the same time, to have consistency in the computations of awards where the percent of disability changes. *See* K.S.A. 44-510e(a)(3).

The Appeals Board's method recomputes the award with each new percent of disability using the 415-week statutory time limit, minus the appropriate amounts of temporary total disability compensation due, and then provides a credit for any weeks previously paid or payable under the earlier disability percentages.

In this instance, using the Board's method of computing awards, claimant would be entitled to 62 weeks of temporary total disability compensation at the appropriate rate of $141.05 per week, followed by 24.86 weeks permanent disability compensation at the increased rate of $209.02 per week (resulting from an increase in average weekly

wage--See K.S.A. 44-511) in the amount of $5,196.24 for the period February 26, 1996, through August 19, 1996, based upon an average weekly wage of $313.51 and a permanent disability award of 73.5 percent to the body as a whole. As of August 19, 1996, claimant's work disability is modified to a 30.5 percent permanent partial disability. The 30.5 percent permanent disability results in 112.24 total weeks due and owing after deducting the temporary total disability compensation. As claimant was only paid 24.86 weeks under the 73.5 percent permanent disability, claimant is entitled to an additional 87.38 weeks of disability under the new lower 30.5 percent permanent disability rate.

The Board acknowledges this method of computation appears to use the 30.5 percent permanent disability as the ceiling or maximum number of weeks due. This is only true when the previously awarded disability percentage pays out fewer weeks than would be due under the new percentage of disability. Had claimant been paid 150 weeks of disability under the 73.5 percent disability award and then become eligible for a 30.5 percent permanent disability, none of the weeks paid above the 112.24 due would be deducted. Claimant would be still entitled to the full 150 weeks. However, because the time period under which claimant was entitled to a 73.5 percent disability was so short, the end result is that the 30.5 percent becomes the highest award payable. In circumstances where more weeks are paid or payable under the earlier disability rating than would be due under the later disability rating, claimant would be entitled to the higher number of weeks paid or payable as the maximum number of weeks due.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that an Award is granted in favor of claimant, Catherine J. Deist, and against the respondent, Dillon Companies, Inc., a qualified self-insured, for an injury occurring on December 29, 1994.

Claimant is entitled to 62 weeks temporary total disability compensation at the rate of $141.05 per week in the amount of $8,745.10, followed by 24.86 weeks permanent partial disability compensation at the rate of $209.02 per week in the amount of $5,196.24 for the period February 26, 1996, through August 19, 1996, and based upon an average weekly wage of $313.51 and a permanent partial disability of 73.5 percent to the body as a whole.

As of August 19, 1996, claimant's work disability is modified and claimant becomes entitled to 87.38 weeks permanent partial disability compensation at the rate of $209.02 per week in the amount of $18,264.17, for a total award of $32,205.51 and based upon

a 30.5 percent permanent partial general disability. As of August 31, 1999, this entire award is due and owing and ordered paid in one lump sum minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contravene the orders expressed herein.

IT IS SO ORDERED.

Dated this ____ day of December 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

The undersigned agrees with the majority conclusion but would add the following responses to concerns expressed by the Court of Appeals:

(1) Are the Board's calculations in this case consistent with its findings?

The opinion by the Court of Appeals states that the Board's computations are inconsistent with its findings. The Board found in this case that claimant initially had a 73.5 percent work disability during the period from February 26, 1996, to August 19, 1996, and then a 30.5 percent disability. The Court stated:

> Although the Board made two separate calculations, both are based on a disability rate of 30.5%. For instance, multiplying 368 weeks times 30.5% is 112.24 weeks. The next step is to multiply 112.24 times $209.02 per week, and the total award is $23,460.41. This is identical to the award computed separately, for each period, by the Board. It is clear that the entire award

> is based on a disability of 30.5%. There is no award based on a disability of 73.5%. . . .
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> . . . .
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> The problem as we view it is that the Board's award of compensation is inconsistent with its findings of fact. The award for the period of February 26, 1996, to August 19, 1996, is, according to the Board, based "upon an average weekly wage of $313.51 and a *permanent partial disability of 73.5 percent to the body as a whole*." (Emphasis added.) The actual award for this period, however, is obviously calculated based on a disability rate of 30.5%, not 73.5%.

This conclusion may mean the Court interprets the statute differently than the Board, in which case the Court's interpretation obviously controls, or it may stem from a misunderstanding of the Board's policy. In either case, it seems to assume that the benefits for a 73.5 percent disability will be different than the benefits for a 30.5 percent disability. But the benefits for the limited period from February 26, 1996, to August 19, 1996, would not be different with either disability, 73.5 percent or 30.5 percent, if that disability were the only disability. Under the formula found in K.S.A. 44-510e, the percentage of disability affects the number of weeks paid, not the amount of the weekly benefit. The period from February 26, 1996, to August 19, 1996, is less than the number of weeks which would be paid for a 30.5 percent disability. Claimant would, therefore, receive the same weekly benefits for the entire period under either percentage of disability. In this sense, the Board considers the award in this case, for the period from February 26, 1996, to August 19, 1996, to be an award for 73.5 percent. Claimant received the same benefits for this period as he would have if the 73.5 percent were the only disability rating. In our view, the question raised here is, in part, whether a later change in disability changes the amount due for that period. The Board finds nothing in the language of the statute which suggests it should.

(2) Additional practical reasons support the calculation used by the Board.

In addition to the above responses to the concerns raised in the opinion by the Court of Appeals, the undersigned would add practical considerations which, I believe, favor the Board's calculation. Under the method proposed by the parties, awards would be subject to modification on a more frequent basis. At the extreme, an hourly employee who earned varying amounts of overtime pay would have a slightly different wage each week. As a result he or she would have a slightly different disability. Even the common annual wage changes would produce an awkwardly large volume of award modification. Each change in pay requires a recalculation.

The Board's calculation reduces this problem. The disability still changes as frequently as it would with the method proposed by the parties. That change is part of the statutory calculation of work disability based, in part, on the percentage wage difference after the accident. But under the Board's policy, the change in disability will not require modification of the award until the change makes a difference in the benefits. If the award is reduced, the change will not make a difference until the respondent has paid all the benefits it would pay under the reduced award. Similarly, if the award is increased, the change will not affect benefits until respondent has paid all benefits due under the initial lower award.

The frequent change in benefits is, by itself, a potential practical problem. In addition, the frequent change creates problems with other provisions in the Act. As the majority points out, the recalculation cannot be done until the end of the period, after the benefits have been paid or are past due. If the change is on an annual basis, this conflicts with limits set in the review and modification provisions in K.S.A. 44-528. That statute provides that the effective date of any modification cannot be more than six months before the filing of the application for review and modification.

In addition, the method proposed by the parties makes it more difficult to address problems created by the fact the Act does not specify what period to use when calculating the claimant's average weekly wage after the injury. Average weekly wage is, for hourly employees, calculated on the basis of 26 weeks. K.S.A. 44-511. But nothing in the Act says what 26 weeks should be used to calculate the post-injury wage used in the work disability calculation. To address this problem, the Board has used the latest 26 weeks shown in the evidence. This is done, in part, with the expectation that the change in wage will stabilize over time. But the latest wage can also be used, in part, because it is unnecessary to change the wage calculation for each 26-week period after the accident. Often the earlier wage calculation will not change the benefits due under the latest wage shown in the evidence.

For these reasons, in addition to those stated in the majority opinion, the undersigned agrees with the method used by the Board to calculate benefits in cases where there has been a change in the disability.

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BOARD MEMBER

c: Jan L. Fisher, Topeka, KS
Scott J. Mann, Hutchinson, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director